90-1806

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

PORT CLINTON ASSOCIATES,

Petitioner,

versus

BOARD OF SELECTMEN OF THE TOWN OF CLINTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

MELVIN J. SILVERMAN
5 Mott Avenue
Norwalk, CT 06850
(203) 853-1221

Counsel for Petitioner

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTIONS PRESENTED

Whether the action of an administrative agency, acting pursuant to an ordinance which contains no standards to guide its action, denying an application by a property owner to exercise a property right under State law constitutes a violation of the procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution for which 42 U.S.C. § 1983 provides a remedy?

Whether an applicant is required to make a second application to an administrative agency as a prerequisite to a claim of a taking in violation of the Taking Clause of the Fifth Amendment as applied by the Fourteenth Amendment where: the applicant is denied the exercise of a property right by an administrative agency acting pursuant to an ordinance which fails to contain even a single standard to guide its discretion; the agency is not required by State law to advise the applicant as to the scope of what application it would grant; and where the state statutory remedy of an appeal does not allow the sufficiency of the regulations to be challenged in that appeal?

PARTIES

Plaintiffs:

Port Clinton Associates
Port Clinton Marina, Inc.

Defendants:

Board of Selectmen of the Town of Clinton
Virginia D. Zawoy
Margery C. Scully
Patricia A. Swaun
Miguel A. Escalera
Edward A. Miller, III
Town of Clinton
The State of Connecticut
Leslie Carothers, Commissioner of Environmental Protection For The State of Connecticut

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OPINIONS BELOW

The opinion of the Connecticut Supreme Court is reported at *Port Clinton Associates v. Board of Selectmen,* 217 Conn. 588, ____ A.2d ____ (1991) is reprinted in the appendix, p. A2.

JURISDICTION

The decision of the Connecticut Supreme Court was announced on February 26, 1991. The jurisdiction of this

Court to review that judgment is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The full text of the Fifth and Fourteenth Amendment to the United States Constitution are set forth in the appendix, p. A1.

STATEMENT OF THE CASE

The plaintiffs are the owners and operators of a marina in Clinton, Connecticut. The defendants are The Town of Clinton, its Board of Selectmen, and the individual members of that board. Nominal parties are the State of Connecticut and its Department of Environmental Protection. The plaintiffs brought an action in the Superior Court for the State of Connecticut, in part under 42 U.S.C. § 1983, and in part under the general jurisdiction of the Connecticut Superior Court, claiming, *inter alia,* violations of both substantive and procedural due process, by the application to it, and the denial thereunder, of an ordinance which was conceded by the State of Connecticut to have been enacted without authority and which contained not a single standard to prevent the Board of Selectmen from acting at whim, with no reins upon its discretion. The trial court dismissed the complaint for want of subject matter jurisdiction. Upon appeal, the Connecticut Supreme Court sustained the trial court's action, but for a different reason: the failure of the plaintiffs to

return to the standardless Board with a less "grandiose" application. Neither court addressed the alleged due process violations which clearly appear in the complaint.

The plaintiffs sought to extend existing docks into the navigable waters of the State. Under State law, the right to this extension is a property right. Its application was approved by the Connecticut Department of Environmental Protection, which had jurisdiction; was found by the U.S. Army Corps of Engineers, which had concurrent jurisdiction, not to impede navigation, but which denied a permit without prejudice because of local disapproval. That disapproval came from the Board of Selectmen, which had adopted, without authority from the State, an ordinance purporting to give it the power to approve or disapprove improvements made in the tidal waters of the State adjacent to its land. That ordinance simply gave the Board power to approve or disapprove; it set forth not a single standard to guide the exercise of its discretion in doing so. The ordinance was repealed four and one/half years after the plaintiffs started their applications and over three years after it initiated this litigation. The plaintiffs do not know the source from which the Connecticut Supreme Court found that the policies of the Corps of Engineers have now changed and would no longer permit the construction applied for originally, but believe that to be the case.

The opinion of the Connecticut Supreme Court acknowledged the various claims made by the plaintiffs. It held that the plaintiffs could not maintain a claim for a taking until it had made at least one additional and less "grandiose" application to the Board of Selectmen, without

in any way referring to the lack of standards in the ordinance governing its action. Given the approval by both state and federal agencies with jurisdiction, the plaintiffs have no idea why the Connecticut Supreme Court characterized the application as "grandiose"; the opinion gives no hint. The Connecticut court acknowledged that a claim was made under 42 U.S.C. § 1983 for a deprivation of due process but did not speak to that claim.

REASONS FOR GRANTING THE PETITION

This case presents several reasons which support the granting of this petition. The Connecticut Supreme Court has refused to follow the mandate of this Court which requires compensation for even a temporary taking. It failed to recognize that damages are payable for a violation of the absolute right to due process. This case also presents a decision on an important federal question which has not been, but should be, settled by this Court: *viz.*, whether one claiming to be the victim of a regulatory taking must, in order to determine the final decision of the regulatory agency, resubmit an application to that agency where the controlling regulation fails to meet the minimum requirements of due process.

A. One whose property has been adversely affected by a ruling of an administrative agency should not be required to resubmit an application to that agency, where the regulation governing the agency action contains no standards to limit and guide the discretion of the agency.

This Court, when dealing with claimed regulatory takings, has imposed a rule that the applicant must first

obtain a definitive position of the initial decision-maker, following avenues open to it under the regulatory scheme. *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). The rule is equally clear that an applicant "is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain the determination." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 353, 106 S.Ct. 2561, 2567, 91 L.Ed.2d 285 (1986).

If an administrative agency impairs a citizen's right in a manner not consonant with the Due Process Clause, that citizen has the right to recover damages under 42 U.S.C. § 1983, whether the deprivation is of liberty or of property. *Zinermon v. Burch,* 494 U.S. ____, 110 S.Ct. 975, 108 L.Ed.2d 100, 118 (1990); *Lynch v. HFC,* 405 U.S. 538, 552, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972); *Giaccio v. Pennsylvania,* 382 U.S. 399, 402, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The right to procedural due process is "absolute"; not dependant upon the merits of a claimant's substantive assertions; and is actionable even in the absence of actual injury. *Carey v. Piphus,* 435 U.S. 247, 266-7, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978).

The Connecticut court's limited response to the issues presented was based on the regulatory taking cases where the procedural due process question was not an issue. *See Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 182 n.4, 105 S.Ct. 3108, 3114 n.4, 87 L.Ed.2d 126 (1985).

The Connecticut Supreme Court, speculating that the standardless Board might have approved a "somewhat

less 'grandiose' proposal," held that the operator was barred from making its taking claim by the lack of finality, required by its reading of applicable precedent of this Court, on the part of the selectmen. While the court specifically imposed no obligation to make "repeated applications," it found as a matter of law, in a case where compensation was demanded, that, "in most cases, a property owner must do more than submit one plan to an agency." 217 Conn. at 607. Notwithstanding the constitutional invalidity of the agency's regulation, a rejected property owner is now required, at least under the Connecticut Supreme Court's view, to subject itself to further deprivations of procedural due process, by submitting a second time to a regulation which does not contain or carry "an understandable meaning with legal standards." *Giaccio v. Pennsylvania,* 382 U.S. 399, 403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966).

The requirement for objective standards in administrative proceedings is an integral requirement of the due process guarantee of the federal constitution. "The touchstone of due process is protection of the individual against arbitrary action of government." *Daniels v. Williams,* 474 U.S. 327, 331, 106 S. Ct. 662, 665, 86 L.Ed.2d 662 (1986). When an administrative agency is called upon to make a determination upon an application, such determinations must be made on the basis of "narrowly drawn, reasonable and definite standards." *Niemotka v. Maryland,* 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951). "No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis. . . ."

Morton v. Ruiz, 415 U.S. 199, 233, 94 S.Ct. 1055, 1073, 39 L.Ed.2d 270 (1974). The law is required to "provide explicit standards for those who apply them." *Greyned v. Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). It may be of some significance that the Connecticut Supreme Court had earlier specifically ruled that an ordinance adopted under § 7-14, as was the one at issue here, must be sufficiently precise to prevent the "ad hoc," "at the whim of," and "arbitrary and capricious enforcement" of the ordinance. *Bottone v. Westport,* 209 Conn. 652, 672, 553 A.2d 588 (1989). Yet the Connecticut view is that an applicant must allow that agency to roam at will over the adjudicative landscape, acting *ad hoc* and whimsically, until either some application is granted or the very least grandiose application is denied.

The Connecticut judicial system provides no direct or expeditious method of reviewing administrative agency decisions. Each subjective agency action must be appealed to the Connecticut Superior Court. That court cannot review the sufficiency of the vague regulation; a separate action must be initiated for that purpose. *Cioffoletti v. Planning & Zoning Commission,* 209 Conn. 544, 563, 552 A.2d 796 (1989). The reviewing court will examine the record to determine whether there is substantial evidence in the record to support the agency's decision; *Huck v. Inland Wetlands and Watercourses Agency,* 203 Conn. 525, 540-541, 525 A.2d 940 (1987). In a wetlands case, this standard can be met by evidence which "tends to show a potential of pollution." 203 Conn. at 549. Since virtually every human interaction with nature, from exhaling carbon monoxide, to growing and harvesting crops, to exercising bodily functions, can be characterized as

tending to pollute, the agency meets this criteria easily. And it may hear evidence to determine, on the balancing test created by the Connecticut court; *Cioffoletti, supra,* at 562-3; whether the regulation is void because of its confiscatory effect upon the applicant's property. *DeForest & Hotchkiss Co. v. Planning & Zoning Commission,* 152 Conn. 262, 269, 205 A.2d 774 (1964); *Troiono v. Zoning Commission,* 155 Conn. 265, 269-70, 231 A.2d 536 (1967); *Strom v. Planning & Zoning Commission,* 153 Conn. 339, 343-4, 216 A.2d 623 (1966). Such findings, rare among Connecticut jurisprudence, do not result in the payment of compensation; the regulation is simply voided as to the particular property affected. *DeMello v. Plainville,* 170 Conn. 675, 680, 368 A.2d 71 (1976).

Each time the Superior Court finds that there was support in the record or that the balancing test has not been violated, the applicant must then submit a new and less "grandiose" application. This must be done at least twice, under the Connecticut court's view. But because Connecticut has specifically told agencies that they have no obligation to advise rejected applicants of the scope of the permission which would be granted; *Huck, supra,* 203 Conn. at 553; this two-application minimum most probably will not result in any court learning the definitive position of the initial decision-maker. *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). For example, under the Connecticut rule, one applicant was required to submit four applications, all of which were denied by an agency, until finally a court found that there was a regulatory taking. *Gil v. Inland Wetlands and Watercourses Agency,* 23 Conn. App. 379, 580 A.2d 539 (1990);

and the Connecticut Supreme Court has decided to review that finding. *Cert. granted,* 216 Conn. 829. The Connecticut Supreme Court apparently considers this course of separate litigations fair; but it certainly cannot be characterized as anything other than piecemeal.

Although one Circuit has created a futility exemption to the finality requirement; *see, Hoehne v. County of San Benito,* 870 F.2d 529, 533-535 (9th Cir. 1989); the Second Circuit has annexed a requirement to the vindication of a deprivation of due process in a regulatory taking case that there be a strong likelihood, absent the alleged denial of due process, that the application would have been granted. *See, Natale v. Town of Ridgefield,* Nos. 1816, 1817, Decided March 5, 1991; *RRI Realty Corp., Inc. v. Village of Southhampton,* 870 F.2d 911, 918 (2d Cir.), *cert. denied,* 110 S.Ct. 240 (1989).

B. Where a property right has been abridged by the action of an administrative agency acting under a regulation which fails to comport with due process requirements, the owner is entitled to receive compensation.

This Court has held that a property owner is entitled to compensation for a temporary taking caused by the application of the police power to its property. *First Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed. 250 (1987). This Court's recitation of the facts in that case reflects that only 12 of the plaintiff's 21 acres were affected by the challenged regulation. Yet the Connecticut Court has restricted that edict only to situations "where the challenged regulation deprives the owner of *all* use of his property" and where "the ordinance . . . did not provide for special permis-

sion to build under any circumstances." 217 Conn. at 601, n.15. Also implicit in the Connecticut Court's decision is a standard of review which is lower than that constitutionally mandated. This Court has frequently stated that a police power regulation must have a "substantial" relationship to a legitimate state interest; *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Penn Cent. Transp. Co. v. City of New York,* 438 U.S. 104, 127, 98 S.Ct. 2646, 2660, 57 L.Ed.2d 631 (1978); *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 1242, 94 L.Ed.2d 472 (1987); *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141, 3146, 97 L.Ed.2d 677 (1987). In *Nollan, supra,* the Supreme Court specifically stated:

> "We have required that the regulation 'substantially advance' the legitimate State interest sought to be achieved. *Agins v. Tiburon,* 447 U.S. 255, 260 (1980), not that the State *could rationally have decided* the measure adopted might achieve the State's objective." (Emphasis by the Court.)

The "substantially advance" requirement was stated in the very first land use case decided by the United States Supreme Court: *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 72 L.Ed. 842 (1926); and the lack of a substantial relationship was the basis for overturning a local zoning decision in *Nectow v. City of Cambridge,* 277 U.S. 183, 187-88, 48 S.Ct. 447, 72 L.Ed. 842 (1928). The "substantial relation" requirement not only appears in the Fifth Amendment takings context; it is also imposed in due process cases. "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, *and*

that the means selected shall have a real and substantial relation to the objective sought to be obtained." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84-85, 100 S.Ct. 2035, 64 L.Ed.2d 471 (1980).

Despite this history, the Connecticut Court insists on maintaining its "rational relationship" criteria. *Builders Service Corporation v. Planning & Zoning Commission*, 208 Conn. 267, 284, n.12, 545 A.2d 530 (1988).

CONCLUSION

The decision of the Connecticut Supreme Court denies a Connecticut property owner a cause of action to redress a deprivation of due process; it denies that property owner compensation for a temporary taking of some of its property; it requires a second submission to, and a rejection by, an agency whose discretion is uncontrolled, even where federal and state agencies with jurisdiction approve, before it can seek compensation; and it reviews that agency action without requiring a substantial nexus to a legitimate State objective. Each of these denials is contrary to holdings of this Court. For the foregoing reasons, the petitioners pray that this Court grant Certiorari.

Respectfully submitted,

MELVIN J. SILVERMAN
5 Mott Avenue
Norwalk, CT 06850
(203) 853-1221

Counsel for Petitioner

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CONSTITUTIONAL PROVISIONS A1

OPINION OF CONNECTICUT SUPREME COURT A2

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PORT CLINTON ASSOCIATES ET AL. *v.* BOARD OF SELECTMEN OF THE TOWN OF CLINTON ET AL.

SHEA, J. The plaintiffs, Port Clinton Associates and Port Clinton Marina, Inc.[1] (Port Clinton), wanted to expand their docks further into Clinton Harbor so that they could add fifty-seven boat slips to their seventy-two slip marina. Their goal was frustrated, however, when the Clinton board of selectmen (board), acting pursuant to a town ordinance regulating building lines in Clinton waterways, denied permission for the expansion. Port Clinton sought relief in the Superior Court. In its final form, their challenge to the board's decision alleged, inter alia, an illegal "taking" under the fifth and fourteenth amendments to the United States constitution, and violations of 42 U.S.C. § 1983 (predicated upon the unconstitutional taking). The trial court dismissed these claims for lack of subject matter jurisdiction because it concluded that the board's action would not be "final" enough to give rise to a taking unless Port Clinton first pursued and lost an administrative appeal. In this appeal, we must decide whether the administrative decision at issue was sufficiently "final" to allow the trial court to consider the merits of Port Clinton's claims. We do not agree with the trial court that Port Clinton was required to pursue a statutory appeal before bringing its § 1983 claim, but conclude that in this case Port Clinton did not allege sufficient "finality" to support either its taking or its § 1983 claim. Accordingly, we affirm the judgment of the trial court dismissing the complaint.

Since this case is about procedure, a review of its procedural history is appropriate. The following facts are

[1] Port Clinton Associates owns the land and the marina built onto the land that are the subject of this appeal. Port Clinton Marina, Inc., leases the marina from Port Clinton Associates and runs the marina business.

not in dispute.[2] Prior to 1985, Port Clinton owned and operated a seventy-two slip marina. The marina was composed of three piers, each extending approximately two hundred feet into the Hammonassett River near the elbow where the Hammonassett and Indian Rivers flow into Clinton Harbor. In early 1985, Port Clinton applied to the U. S. Army Corps of Engineers (Army Corps), which is responsible for regulating navigable waters of the United States; *United States* v. *Cherokee Nation of Oklahoma*, 480 U.S. 700, 107 S. Ct. 1487, 94 L. Ed. 2d 704 (1987); 33 U.S.C. § 403 (§ 10 of the Rivers and Harbors Appropriations Act of 1899); 33 C.F.R. § 322.1 et seq.; for permission to extend two of the marina's piers by approximately two hundred fifty feet, thereby adding fifty-seven boat slips to the marina.[3] Port Clinton sought a similar permit from the Connecticut department of environmental protection (DEP), which has concurrent jurisdiction with the Army Corps over waters within Connecticut boundaries. 33 C.F.R. § 322.1; *Cummings* v. *Chicago*, 188 U.S. 410, 430, 23 S. Ct. 472, 47 L. Ed. 525 (1903). The DEP granted the permit, which by its terms was subject to the possible existence of local ordinances or regulations.[4] The Army Corps denied the permit application because Port Clinton had not obtained local approval.[5]

[2] The trial court's memorandum of decision set forth few facts. The record, however, contains permit applications, maps, agency correspondence and other supporting documents. The facts set forth herein are intended to summarize this undisputed documentary evidence, not to express any conclusion regarding possible inferences to be drawn from that evidence.

[3] See Appendix to this opinion.

[4] The DEP's "Certificate of Authorization," dated December 10, 1985, stated: "This permit is subject to and does not derogate any present or future property rights or powers of the State of Connecticut, and conveys no property rights in real estate or material nor any exclusive privileges, and is further subject to any and all public and private rights and to any federal, state or local laws or regulations pertinent to the property or activity affected hereby."

[5] The Army Corps of Engineers advised Port Clinton by letter dated June 19, 1986: "Pursuant to Federal Regulations, Title 33 CFR Part

After the Army Corps denied its permit application, Port Clinton applied to the board of selectmen for local permission, pursuant to "An Ordinance Establishing Building Lines in Certain Clinton Waterways."[6] The

320.4 (j) (1), 'if a required Federal, State and/or local certification and/or authorization has been denied for activities which also require a Department of the Army Permit, the Army Permit will be denied without prejudice to the right of the applicant to reinstate processing of the application if subsequent approval is received from the appropriate Federal, State and/or local agency.' "

[6] "AN ORDINANCE ESTABLISHING BUILDING LINES IN CERTAIN CLINTON WATERWAYS

1. Pursuant to Section 7-147 of the Connecticut General Statutes, as amended the Waterway lines hereinafter described are hereby established for the purposes of conserving and preserving the water resources of Clinton Harbor, Hammonassett River and Long Island Sound, and for all other lawful purposes.

2. The Waterway Lines are those delineated on a map entitled 'TOWN OF CLINTON ESTABLISHMENT OF HARBOR LINES' as prepared by Flaherty-Giavara and Associates Environmental Design Consultants, 158 Bull Hill Lane, West Haven, Conn., Scale 1" = 200' dated 20th, September, 1972, as shown on four (4) drawings, which map is hereby incorporated in, and made a part of, this Ordinance.

3. No private person or firm or corporation shall hereafter place any permenant obstruction or encroachment seaward of, or beyond, (in the direction of the waterway), the Waterway Lines, without the written permission of the Clinton Board of Selectmen.

4. Any person, firm or corporation, desiring such permission, shall make written application therefor to the Board of Selectmen. Such application shall contain complete details of, and a map of, the proposed obstruction or encroachment and showing its relationship to the Waterway Lines. Such map shall be a Class A-2 survey and shall be certified by a Licensed Surveyor or Professional Engineer.

5. The Board of Selectmen shall refer such application to the Clinton Harbor Commission for its recommendations. The Harbor Commission may, at its discretion, hold a public hearing on such application, and, shall submit its report and recommendation to the Board of Selectmen within 60 days after referral to the Commission.

6. Within 90 days after its receipt of an application for permission the Board of Selectmen shall grant or deny permission, in writing.

7. Any person, firm or corporation, in violation of this ordinance shall, upon conviction thereof, be fined not more than $100. for each day of such violation.

town had enacted the ordinance "[p]ursuant to Section 7-147 of the Connecticut General Statutes."[7] The ordinance required anyone planning construction that would extend beyond the established building lines (approximately one hundred feet off shore) to seek permission from the board. Pursuant to the ordinance, the board referred the application to the Clinton harbor

8. The Board of Selectmen shall take all appropriate action in the Courts to restrain and/or eliminate any violation of this ordinance.

9. The invalidity of any provisions of this ordinance shall not effect the validity of the remainder.

10. This ordinance shall be effective at 12:05 o'clock on the 18th Nov. 1972."

[7] Prior to 1988, General Statutes § 7-147 provided: "PROHIBITION OF OBSTRUCTIONS IN WATERWAYS. Any town, city or borough may, within its jurisdiction, establish by ordinance lines along any part of any waterway beyond which, in the direction of the waterway, no permanent obstruction or encroachment shall be placed by any private person or any firm or corporation, unless permission is granted in writing by the legislative body of the town, city or borough. Wherever there is a city or borough within a town, the town shall have authority to establish such lines for such of its area as is not within such city or borough, and the city or borough shall have such authority within its boundaries. Any two or more adjoining municipalities shall have authority to investigate jointly the desirablility of establishing lines on either or both sides of a waterway within their jurisdiction. Any private person or any firm or corporation aggrieved by any decision of a legislative body made in accordance with this section may, within thirty days after notice thereof, appeal from such decision in the manner provided by section 8-8 for appeal from the decisions of a municipal zoning board of appeals. Nothing contained in this section shall limit or restrict the commissioner of transportation in exercising his authority over the harbors and navigable waters of the state, nor apply to any dam, bridge, pipeline or other similar structure, and appurtenances thereto, extending across any waterway, which are otherwise in compliance with law."

The statute was extensively amended by Public Acts 1988, No. 88-327, §§ 1, 3, after the Superior Court found the statute to be unconstitutionally vague. *Bottone* v. *Westport*, Superior Court, Judicial District of Stamford-Norwalk, Docket No. CV87-0085097 (January 12, 1988); (3 Conn. Super. Ct. Reports 160, 163 (1988). Subsequently, as discussed infra, the Supreme Court reversed that decision and found the statute to be constitutionally sound when read to require a town to prescribe by ordinance the process for exceptions instead of leaving exceptions to be "decided on an ad hoc basis at the whim of the local legislative body." *Bottone* v. *Westport*, 209 Conn. 652, 672, 553 A.2d 576 (1989).

commission, which held a public hearing and then recommended denial of the application.

The board issued a memorandum of decision denying Port Clinton's application. In its decision, the board first noted the purposes and standards set forth in the ordinance, " 'conserving and preserving' the water resources of Clinton Harbor and other waterways." It then refused permission on the basis of "evidence indicat[ing] that the proposed expansion would have a negative impact on safety, both in the harbor and on shore and that it could cause harm to the environmental quality of the harbor and its water resources. Both the expansion of the docking facilities further out into the harbor and the resulting increase in the intensity of onshore activities could lead to further crowding, congestion, and pollution."

Port Clinton did not resubmit a revised application. Instead, pursuant to § 7-147, it filed an administrative appeal in the manner prescribed by General Statutes § 8-8,[8] claiming, inter alia, that the ordinance itself con-

[8] General Statutes (Rev. to 1985) § 8-8 provides in pertinent part: "APPEAL FROM BOARD TO COURT. REVIEW BY APPELLATE COURT. (a) Any person or persons severally or jointly aggrieved by any decision of said board, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of said board, or any officer, department, board or bureau of any municipality, charged with the enforcement of any order, requirement or decision of said board, may, within fifteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, take an appeal to the superior court for the judicial district in which such municipality is located, which appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court. . . . "

"(e) The court, upon an appeal taken under subsection (a) of this section, shall review the proceedings of said board and shall allow any party to such appeal to introduce evidence in addition to the contents of the record of the case returned by said board if the record does not contain a complete transcript of the entire proceedings before said board, including all evidence presented to it, pursuant to section 8-7a, or if, upon the hearing upon such appeal, it appears to the court that additional testimony is necessary for

stituted an unconstitutional taking and was preempted by state regulation. In the course of the ensuing procedural skirmishes, Port Clinton added counts charging, inter alia, that: (1) both § 7-147 and the ordinance were unconstitutionally vague, (2) the ordinance was invalid because it was improperly adopted, exceeded the town's geographical jurisdiction, and was preempted by and conflicted with various statutes; and (3) the board's decision constituted an unconstitutional taking and therefore violated 42 U.S.C. § 1983. In its final version, Port Clinton's revised amended complaint contained these counts and eliminated the administrative appeal.[9]

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the equitable disposition of the appeal. The court may take such evidence or appoint a referee or committee to take such evidence as it directs and report the same to the court, with his or its findings of facts and conclusions of law, which report shall constitute a part of the proceedings upon which the determination of the court shall be made.

"(f) The court, upon an appeal taken under subsection (a) of this section and after a hearing thereon, may reverse or affirm, wholly or partly, or may modify or revise the decision appealed from. Costs shall be allowed against said board if the decision appealed from is reversed, affirmed in part, modified or revised. Appeals from decisions of said board shall be privileged cases to be heard by the court, unless cause is shown to the contrary, as soon after the return days as is praticable.

"(g) There shall be no right to further review except to the appellate court by certification for review, upon the vote of two judges of the appellate court so to certify and under such other rules as the judges of the appellate court establish. The procedure on such appeal to the appellate court shall, except as otherwise provided herein, be in accordance with the procedures provided by rule or law for the appeal of judgments rendered by the superior court unless modified by rule of the judges of the appellate court. . . ."

[9] Originally, Port Clinton named the board of selectmen as defendants. Subsequently, on September 3, 1986, Port Clinton cited in as parties defendant individual members of the board of selectmen, namely, Virginia D. Zawoy, Margery C. Scully, Patricia A. Swaun, Miguel A. Escalera and Edward A. Miller III. The motion to cite in was granted September 22, 1986. These defendants were named in the revised amended complaint dated December 7, 1988, and have joined the board's briefs on appeal. On December 21, 1987, the court ordered that the state of Connecticut and the commissioner of environmental protection be added as parties defendant; these defendants, although not named in the revised amended complaint of Decem-

In the interim between the filing of the original complaint and rendition of the judgment of dismissal, a trial court in an unrelated case, *Bottone* v. *Westport*, Superior Court, Judicial District of Stamford-Norwalk, Docket No. CV87-0085097 (January 12, 1988), found General Statutes § 7-147 to be unconstitutionally vague.[10] The legislature then amended the statute, effective June 3, 1988, thereby repealing the statutory authority for the ordinance. See Public Acts 1988, No. 88-327. The town therefore repealed its ordinance effective November 14, 1989.

Port Clinton filed a motion for summary judgment on September 9, 1988, which the trial court denied on April 27, 1989. In its decision, the court appeared to reject the taking and § 1983 claims as a matter of law, but it left for trial the question of the ordinance's validity in light of the factual dispute over the town's geographical jurisdiction. Thereafter, on August 2, 1989, the board filed its own motion for summary judgment. Instead of ruling on that motion, the court, in a decision dated January 31, 1990, dismissed the case suo motu for lack of subject matter jurisdiction because (1) the challenges to the ordinance and statute were moot, and (2) the other claims were predicated upon a 'taking' by an agency decision that would not be "final" until the statutory appeal process, which Port

ber 7, 1988, did file answers on August 31 and September 25, 1989, respectively. In their answers, the state and the commissioner agreed with Port Clinton's assertion that the town's ordinance exceeded the statutory authorization under General Statutes § 7-147 and was preempted by state regulation. Neither the state nor the commissioner has filed a brief or otherwise participated in the appeal, presumably because the disputed ordinance has been repealed. Throughout this opinion, the terms "defendants" and "the board" refer collectively to the board of selectmen and the individual board member defendants.

[10] Reversing the trial court's decision, we held the statute to be constitutional as construed by this court. *Bottone* v. *Westport*, 209 Conn. 652, 553 A.2d 576 (1989). See footnote 7, supra.

Clinton had originally commenced but later abandoned, was complete. On appeal, Port Clinton appears to challenge only the trial court's second conclusion by stating the issue to be: "Whether the plaintiff's abandonment of an administrative appeal in favor of a direct challenge to the validity of a harbor building lines ordinance and its enabling statutory authority, together with claims for a 'taking' in violation of 42 U.S.C. § 1983 or inverse condemnation, deprived the court of subject matter jurisdiction to hear or determine the 'taking' claims."

I

The cornerstone of Port Clinton's complaint is its taking claim.[11] As a result of the board's refusal to grant Port Clinton permission to build, it was unable, in 1986, to add the planned fifty-seven boat slips to its dock. That claimed injury would seem to have terminated on November 23, 1989, when the ordinance was repealed. Port Clinton claims, nevertheless, that, because the Army Corps of Engineers changed its own permit requirements in the intervening four years, Port Clinton may no longer build the number of boat slips originally planned. If it had received permission from the town or not been required to seek it in 1986, the boat slips would have been built before the federal rule change and the marina expansion would not have been affected.

To evaluate these claims, we must first understand what "property" Port Clinton claims has been taken.[12]

[11] Port Clinton's substantive and procedural due process claims were also dismissed by the trial court because they were directed toward the repealed ordinance and were therefore also moot.

[12] The fifth amendment to the United States constitution provides: "nor shall private property be taken for public use, without just compensation." The constitution of Connecticut, article first, § 11, provides: "The property of no person shall be taken for public use, without just compensation therefor." Port Clinton has offered no separate analysis under the Con-

Port Clinton owns land abutting navigable waters, specifically, the Hammonassett River. According to Connecticut common law, ownership of such land, termed "upland," extends to the high water mark on the shore. *Lane* v. *Harbor Commissioners,* 70 Conn. 685, 694, 40 A. 1058 (1898). In addition, the owner of upland has certain rights to use the land between high and low water mark and the waters extending therefrom to the point where they become navigable. See *Shorehaven Golf Club, Inc.* v. *Water Resources Commission,* 146 Conn. 619, 624, 153 A.2d 444 (1959). These rights are termed "riparian rights." Riparian rights derive from ownership of the upland from which the waters extend; *Shorefront Park Improvement Assn., Inc.* v. *King,* 157 Conn. 249, 257–58, 253 A.2d 29 (1968); but may be separately alienated. *Shorehaven Golf Club, Inc.* v. *Water Resources Commission,* supra; *State* v. *Knowles-Lombard Co.,* 122 Conn. 263, 265, 188 A. 275 (1936).

Although riparian rights are in fact "property"; *Shorehaven Golf Club, Inc.* v. *Water Resources Commission,* supra; *Simons* v. *French,* 25 Conn. 346, 353 (1856); rather than simply "rights" that constitute elements of ownership; see *Keystone Bituminous Coal Assn.* v. *DeBenedictis,* 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); they are so limited by superior public rights that they are often referred to as a mere "franchise." *East Haven* v. *Hemingway,* 7 Conn. 186, 202 (1828). Thus, "[a] riparian proprietor whose land is bounded by a navigable stream has certain rights, as such, among which, in the language of Mr. Justice Miller, are 'access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use

necticut constitution and we therefore do not address its application to the takings claim. *Hayes* v. *Smith,* 194 Conn. 52, 480 A.2d 425 (1984). Port Clinton's claim under 42 U.S.C. § 1983 is, of course, directed to the deprivation of rights under the federal constitution.

of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those rights may be.' *Yates* v. *Milwaukee*, [77 U.S. (10 Wall.) 497, 504 [(1870)]." *New York, New Haven & Hartford R. Co.* v. *Long*, 72 Conn. 10, 21, 43 A. 559 (1899); accord *Walz* v. *Bennett*, 95 Conn. 537, 542, 111 A. 834 (1920); *Orange* v. *Resnick*, 94 Conn. 573, 578, 109 A. 864 (1920); *Lane* v. *Harbor Commissioners*, supra, 694; *Farist Steel Co.* v. *Bridgeport*, 60 Conn. 278, 283, 22 A. 561 (1891); *State* v. *Sargent*, 45 Conn. 358, 373 (1877). The owner of riparian rights, like Port Clinton, has the right to build a pier or wharf past the low water mark " 'subject to the qualification that he thereby does no injury to the free navigation of the water by the public.' " *Prior* v. *Swartz*, 62 Conn. 132, 138, 25 A. 398 (1892), quoting *Mather* v. *Chapman*, 40 Conn. 382, 395 (1873).

It is undisputed that Port Clinton has already built docks into the water off its upland. Port Clinton therefore has already made some use of its riparian property or rights but not to its outer limit, namely, the navigable channel. See *Lane* v. *Harbor Commissioners*, supra.[13] Thus, the property allegedly "taken" can be

[13] The right to wharf out derives from the right of access to "navigable" or "deep" water. 1 H. P. Farnham, Water and Water Rights § 62. For that reason, "as soon as the point of navigability is reached, the purpose of the pier is fulfilled, and the right to construct it ceases at that point. *Illinois Central Railroad Company* v. *Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 [(1892)]." Id., § 111, p. 522; accord *Lane* v. *Harbor Commissioners*, 70 Conn. 685, 40 A. 1058 (1898). Both Port Clinton and the Board appear to have implicitly assumed throughout this litigation that Port Clinton's right to wharf out extends as far as the federal channel designated by the United States government and mapped out in Port Clinton's proposal. See appendix. The board has argued that because this right to wharf out is subject to the public's superior right of navigation, its deprivation cannot be a "taking," but has not claimed that Port Clinton had no right whatever to expand its dock. See *Lane* v. *Harbor Commissioners*, supra. We shall assume, therefore, for purposes of this opinion only, that Port Clinton had

no more than the right to extend an existing dock as far as the federal channel if public regulations protecting free navigation so permit and if the public's right to free navigation will not be impeded thereby. See *Scranton* v. *Wheeler*, 179 U.S. 141, 163, 21 S. Ct. 48, 45 L. Ed. 126 (1900); cf. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 70, 33 S. Ct. 667, 57 L. Ed. 1063 (1913).

II

The trial court, presented with Port Clinton's claim that a portion of its limited riparian rights had been taken by an unconstitutional and invalid ordinance in violation of 42 U.S.C. § 1983, dismissed the complaint suo motu for lack of subject matter jurisdiction. Port Clinton contends that the trial court improperly relied upon the doctrine of exhaustion of remedies in dismissing the taking and § 1983 claims.

While we agree with Port Clinton that federal law prevents us from applying the exhaustion doctrine to a § 1983 claim; *Patsy* v. *Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982); we do not agree that the trial court ultimately reached its decision on the basis of that doctrine. Rather, we read the memorandum of decision as later amplified[14] to rely on the well-established principle that there can be no regulatory "taking," and thus no deprivation of "private property without just compensation," until there has been a final administrative decision. See *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 192, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985).

the right to wharf out until it reached the federal channel so long as its exercise of that right did not interfere with the public's superior right of navigation.

[14] The trial court further articulated its decision on June 20, 1990, in a memorandum of decision denying Port Clinton's "motion to vacate or set aside judgment of dismissal" dated March 7, 1990.

The reason for the "finality" principle is set forth in *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986). "The regulatory taking claim advanced by appellant has two components. First, appellant must establish that the regulation has in substance 'taken' his property—that is, that the regulation 'goes too far.' . . . Second, appellant must demonstrate that any proffered compensation is not 'just.' . . : It follows from the nature of a regulatory taking claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes. . . . Until a property owner has 'obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property,' 'it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed.' " (Citations omitted.) Id., 348–49.

A

Finality is required when the claim is made that a valid regulation has gone "too far." In this case, however, Port Clinton has charged that the regulation *itself* was invalid and therefore that its "adoption and application" to Port Clinton caused a temporary taking without regard to the extent of loss caused. When the regulation itself is not a "valid" exercise of the police power, United States Supreme Court precedents imply that no matter how "far" it goes, the regulation may constitute a taking. See *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 127, 98 S. Ct. 2646, 57 L. Ed. 2d 631, reh. denied, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592–93, 82 S. Ct. 987, 8 L. Ed. 2d 130

(1962); *Nectow* v. *Cambridge*, 277 U.S. 183, 188, 48 S. Ct. 447, 72 L. Ed. 842 (1928); cf. *Corthouts* v. *Newington*, 140 Conn. 284, 99 A.2d 112 (1953).

We conclude, however, that Port Clinton was nevertheless required to satisfy the "finality" requirement in the sense of showing that "the initial decisionmaker [had] arrived at a definitive position on the issue that inflict[ed] an actual, concrete injury . . . ." *Williamson County Regional Planning Commission* v. *Hamilton Bank*, supra, 193.[15]

We reach this conclusion for two reasons. First, Port Clinton sought not only invalidation of the regulation,[16] but compensation for its injury. Until a trial court knows "how far the regulation goes" it cannot determine the extent of the injury, or, indeed, be certain that there is any injury not de minimis in scope.

More importantly, in contending that the ordinance itself constituted a "per se" taking, Port Clinton did not charge that the ordinance furthered an improper purpose, but rather attacked its lack of specificity, its jurisdictional basis and the method by which it was enacted.[17] We do not believe that the constitution

[15] The decision of the United States Supreme Court in *First Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987), does not require us to reach a different conclusion. That case, holding that a property owner is entitled to compensation for a temporary taking for losses incurred prior to a regulation's repeal, was expressly limited to situations where the challenged regulation deprives the owner of *all* use of his property. Id., 321. Moreover, the ordinance in that case prohibited all construction beyond a specified flood line and did not provide for special permission to build under any circumstances.

[16] As noted above, Port Clinton has not contested that portion of the trial court's decision dismissing as moot the count directly challenging the ordinance's validity.

[17] Port Clinton's complaint attacked the ordinance as "a municipal mode of arbitrarily denying reasonable use of property, confiscating the Plaintiffs' property, or arbitrary conduct, abuse of authority, interfering with the rights of citizens who wish to make recreational use of the coastal waters and permitting predetermined suppression of property rights." That alle-

requires compensation for any temporary infringement of an owner's property rights, no matter how slight, every time a town makes a mistake in construing an enabling statute or in measuring its geographical boundaries. "Temporary harms in [this category] are an unfortunate but necessary by-product of disputes over the extent of the government's power to inflict permanent harms without paying for them. Every time a property owner is successful, in whole or in part, in a challenge to a governmental regulation—whether it be a zoning ordinance, a health regulation or a traffic law—he is almost certain to suffer some temporary harm in the process. At the least, he will usually incur significant litigation expenses and frequently he will incur substantial revenue losses because the use of his property has been temporarily curtailed while the dispute is being resolved." *Williamson County Regional Planning Commission* v. *Hamilton Bank,* supra, 204 (Stevens, J., concurring). The suggestion in *Penn Central Transportation Co.* and *Goldblatt* that when a regulation is invalid as exceeding the police power, any restriction it imposes on the exercise of property rights may constitute a "taking" should not apply to a case where the only invalidity claimed is procedural and the confiscation claimed is less than total.[18]

gation is simply another way of asserting that the ordinance was vague and that it confiscated Port Clinton's riparian rights. The record does not indicate that Port Clinton has argued that the ordinance constituted some kind of invidious discrimination or promoted the private aims of its promulgators or in any other way exceeded the police power to protect and promote the health, safety and general welfare of the public.

[18] While we need not determine what type of invalidity could give rise to a taking no matter "how far" the reach of the regulation, we note Justice Stevens' concurring comment in *Williamson County Regional Planning Commission* v. *Hamilton Bank,* 473 U.S. 172, 202 n.1, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985): "For example, even if the State is willing to compensate me, it has no right to appropriate my property because it does not agree with my political or religious views."

B

Similarly, finality is required even when the claimant does not allege that the challenged regulation deprives him of all reasonable use of the property and constitutes a "practical confiscation"; see *MacDonald, Sommer & Frates* v. *Yolo County,* supra, 349; *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922); but rather alleges that the "interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].' " *Penn Central Transportation Co.* v. *New York City,* supra, 136; see also *Keystone Bituminous Coal Assn.* v. *DeBenedictis,* supra. The latter test, often applied to regulatory takings; see, e.g., *Chevron Oil Co.* v. *Zoning Board of Appeals,* 170 Conn. 146, 151, 365 A.2d 387 (1976); *Brecciaroli* v. *Commissioner of Environmental Protection,* 168 Conn. 349, 355–56, 362 A.2d 948 (1975); see generally C. Rose, "*Mahon* Reconstructed: Why the Takings Issue is Still a Muddle," 57 S. Cal. L. Rev. 561 (1984); permits a property owner to claim a partial taking if the public's gain does not outweigh his loss.[19]

Finality is a prerequisite to such a "partial taking" claim just as it is a prerequisite to a "temporary taking" claim. In each case, without a final administrative decision, the reviewing court cannot measure the extent of the injury to the property owner's interests and can neither decide whether a taking has occurred nor calculate the measure of damages. A secondary consideration, of course, is the possibility that pursuit of

[19] The test in a facial challenge to a statute is whether the statute " 'denies an owner economically viable use of his land.' " *Hodel* v. *Virginia Surface Mining & Reclamation Assn.,* 452 U.S. 264, 295–96, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981), quoting *Agins* v. *Tiburon,* 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980). Port Clinton made a facial challenge to the ordinance and also challenged the board's application of the ordinance.

a final administrative resolution will produce a mutually acceptable solution "thereby obviating any need to address the constitutional questions." *Hodel* v. *Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 297, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); cf. *Tenoco Oil Co.* v. *Department of Consumer Affairs*, 876 F.2d 1013, 1026–27 (1st Cir. 1989).

III

If a property owner has not obtained a final decision from the administrative agency applying the regulation, the reviewing court lacks jurisdiction to rule on a taking claim. The jurisdictional nature of finality derives from its similarity to "ripeness." See *Williamson County Regional Planning Commission* v. *Hamilton Bank*, supra, 185. Thus, the remaining question before us is whether the trial court correctly decided that the board of selectmen's decision was not a "final" decision and thus that the court lacked jurisdiction over the taking claim and the claim under 42 U.S.C. § 1983.

In its memorandum of decision on Port Clinton's motion to vacate or set aside the judgment, the trial court explained its conclusion that lack of finality deprived it of jurisdiction as follows. "The statutory appeal procedure provided a plain and adequate legal remedy, whereby the plaintiffs could have sought to establish the issues of finality and confiscation, as precedents to seeking just compensation. When the plaintiffs withdrew such appeal, they deprived the court of jurisdiction to consider these issues, and rendered the court without power to address the issue of just compensation."

A

In finding a lack of finality, the trial court reached the right conclusion, but for the wrong reason. The United States Supreme Court, in *Williamson County*

Regional Planning Commission v. *Hamilton Bank*, supra, explained what kind of "finality" is a prerequisite to a § 1983 claim predicated upon a taking. "The difference [between the doctrine of exhaustion of administrative remedies, and the finality requirement] is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy* [v. *Board of Regents*], respondent would not be required to exhaust. While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities . . . respondent would not be required to resort to those procedures before bringing its § 1983 action, *because those procedures clearly are remedial.* Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking.

"Resort to those procedures would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed." (Emphasis added.) Id., 193. The court added: "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking. . . . [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." Id., 194–95.

Thus, a property owner need not pursue *remedial* procedures that merely review the propriety of the initial decisionmaker's action. A property owner must, however, pursue all available procedures that could result in a decision favorable to some reasonable use of the property. In addition, a property owner must pursue any procedure whereby it can obtain *compensation* for the impact of the regulation upon his use of his property. Precisely what procedures a given property owner must pursue depends upon the specific regulation at issue.

In *Hamilton Bank,* supra, the property owner submitted a subdivision proposal to the local zoning commission. The commission thereafter changed its density requirements so that the original proposal, which had not yet been acted upon, was no longer in conformity with the regulations. The commission denied several revised plans submitted by the developer. The developer then pursued appeals to the county board of zoning appeals, but did not seek variances from the zoning commission. It also did not avail itself of applicable inverse condemnation procedures and did not argue that these procedures were unavailable or inadequate. The United States Supreme Court concluded that in order to show finality, the developer should have (a) sought variances from the zoning commission, and (b) utilized the inverse condemnation procedures available. Id., 193–95.

The regulation at issue in the present case, by contrast, is not a zoning regulation. In Connecticut, if a property owner's plans do not comply with zoning regulations, the owner can seek to bypass certain requirements by obtaining a variance, or, when applicable, by obtaining an exception to permit it to use the property in a manner generally prohibited by the regulations but permitted upon satisfaction of certain conditions. Variances and exceptions in Connecticut are generally

granted not by the zoning commission, but by the zoning board of appeals. General Statutes § 8-6. Thus, in many instances, a final decision by the "initial decisionmaker," really means a decision by the zoning board of appeals, when that body is not acting in a reviewing capacity but is exercising its power to grant variances and exceptions. See *Florentine* v. *Darien,* 142 Conn. 415, 115 A.2d 328 (1955).

By contrast, Port Clinton had no "decisionmaker" other than the board of selectmen itself from which it could have obtained a more favorable result. In 1985, General Statutes § 7-147 provided only that a property owner aggrieved by a decision based on a town harbor line ordinance could pursue an appeal pursuant to General Statutes § 8-8. That statute, however, provides for an administrative appeal to the *Superior Court,* which may review the propriety of the initial decisionmaker's action within the usual limits on judicial review of an agency action. The statutory appeals process under § 8-8 is, thus, precisely the type of procedure that a claimant under 42 U.S.C. § 1983 need *not* pursue as a prerequisite to filing his suit.

Nevertheless, the trial court was correct in holding that Port Clinton failed to demonstrate the finality required. Port Clinton indisputably submitted only *one* proposal to the board of selectmen. We cannot know whether the board would also have rejected a more modest plan. Although we do not believe "that repeated applications and denials are necessary to pinpoint" the board's position; *MacDonald, Sommer & Frates* v. *Yolo County,* supra, 359 (White, J., dissenting); nor that a property owner must "take patently fruitless measures"; id.; in most cases, a property owner must do more than submit one plan to an agency in order to establish that the agency's decision is "final" for the purposes of the taking clause. See, e.g., id. (owner filed one application to subdivide property into 159 lots); *Wil-*

liamson County Regional Planning Commission v. *Hamilton Bank*, supra (developer submitted two plats for subdivision); *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 101 S. Ct. 1287, 67 L. Ed. 2d 551 (1981) (company abandoned original plan for nuclear power plant and never submitted for approval new plan for industrial park after city adopted "open space" plan); *Penn Central Transportation Co.* v. *New York City*, supra (company submitted only two proposed plans for building skyscraper atop Grand Central railway terminal); *Luf* v. *Southbury*, 188 Conn. 336, 351, 449 A.2d 1001 (1982) (owner seeking damages to his property value due to lawful discontinuance of an unimproved public highway could not show a taking because "we cannot predict what response the plaintiffs would encounter if they were to present subdivision proposals of their own to the appropriate Southbury authorities"); *Brecciaroli* v. *Commissioner of Environmental Protection*, 168 Conn. 349, 357, 362 A.2d 948 (1975) (plaintiff submitted only one application for a permit to conduct an activity on wetlands); *Shorehaven Golf Club, Inc.* v. *Water Resources Commission*, supra, 625 (owner submitted only one application for the designation of a specific channel from which to excavate gravel).

Port Clinton made no attempt whatever to seek a favorable result on another proposal. "Appellant is thus in the same position Mr. and Mrs. Agins would have occupied if they had requested and been denied the opportunity to build five Victorian mansions for their single-family residences, or if San Diego Gas & Electric Co. had asked and been denied the option of building a nuclear power plant. Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *McDonald, Sommer & Frates* v. *Yolo County*, supra, 353 n.9 (referring to *Agins* v. *Tiburon*,

447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 [1980] and *San Diego Gas & Electric Co.* v. *San Diego*, supra).

Port Clinton's proposed expansion would have more than doubled the existing dock's protrusion into the waters of the Hammonassett River and would have come within fifty feet of the channel.[20] It would have added fifty-seven additional boats to river traffic. One of the reasons the board gave for denying the proposal was to protect the safety of the harbor from crowding and congestion.[21] It is not implausible to conclude that the board might have approved a somewhat less "gran-

[20] See "Proposed Dock in Clinton Harbor" at appendix.

[21] Since the board's reasons for its decision included the potentially negative impact of the expansion on harbor safety, it is unlikely that Port Clinton could prevail on the merits of its taking claim. Given that Port Clinton's riparian rights are by definition subject to regulation protecting the public's superior right to navigation, the ordinance, whether or not it was preempted by state regulation, could not take from Port Clinton something it did not already have: an absolute right to build a dock as far as the navigable channel. See *Scranton* v. *Wheeler*, 179 U.S. 141, 163, 21 S. Ct. 48, 45 L. Ed. 126 (1900) (total deprivation of a riparian owner's right of access to navigable water was not a taking where the deprivation occurred when the federal government built a pier to improve public navigability); see also *Lane* v. *Harbor Commissioners*, 70 Conn. 685, 694, 40 A. 1058 (1898) (revocation of a harbor commission permit to extend a wharf was not a taking when a new channel brought navigable water to the edge of the existing wharf). Certainly Port Clinton could not demonstrate that it was deprived of all reasonable use of its "property," that is, its riparian rights; it was already exercising those rights, presumably at a profit. "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest they heretofore had believed was available for development is quite simply untenable." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 130, 98 S. Ct. 2646, 57 L. Ed. 26 631, reh. denied, 439 U.S. 883, 99 S. Ct. 226, 58 L. Ed. 2d 198 (1978); see *Manor Development Corporation* v. *Conservation Commission*, 180 Conn. 692, 433 A.2d 999 (1980) (commission's denial of proposal for thirty-three lot subdivision and acceptance of twenty-six lot subdivision did not constitute a taking); see also *Samp Mortar Lake Co.* v. *Plan & Zoning Commission*, 155 Conn. 310, 314-15, 231 A.2d 649 (1967) (zone change preventing developer from expanding existing nonconforming industrial uses did not constitute a taking).

diose" proposal—the sort of proposal that, unlike the original proposal, would meet revised Army Corps regulations.

IV

In *Hamilton Bank,* the United States Supreme Court implicitly approved the respondent's contention that "there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. *Patsy* v. *Florida Board of Regents,* [supra]." *Williamson County Regional Planning Commission* v. *Hamilton Bank,* supra, 192. *Hamilton Bank* applied that proposition only to a § 1983 claim that was based on an alleged taking, not to a pure taking claim, i.e., one brought without reference to § 1983.

While we have used similar reasoning in addressing a pure taking claim; see *Florentine* v. *Darien,* supra; we need not decide whether one making such a claim is never required to pursue procedures that provide review of the legality of an initial decision but cannot themselves result in a decision allowing an owner some reasonable use of his property or award just compensation for deprivation of reasonable use of the property. For the same reasons given above, whether or not Port Clinton would be required to exhaust the statutory appeals process before presenting its pure taking claim outside the § 1983 context, we conclude that the trial court had no jurisdiction to consider the taking claim until Port Clinton obtained a final decision from the board of selectmen as to the amount of expansion it would permit.

The judgment is affirmed.

In this opinion the other justices concurred.

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No. 90-1806

In The

Supreme Court of the United States

October Term, 1990

PORT CLINTON ASSOCIATES,

Petitioner,

versus

BOARD OF SELECTMEN OF THE TOWN OF CLINTON,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF IN OPPOSITION

* Joseph G. Lynch
Paul D. Meade
Halloran & Sage
One Goodwin Square
225 Asylum Street
Hartford, Connecticut 06103
(203) 522-6103

W. Campbell Hudson III
Hudson & Kilby
P.O. Box 498
Essex, Connecticut 06426
(203) 767-0195

Counsel for Respondent

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a claimant may premise a "taking" claim seeking "just compensation" against a municipal authority based upon the denial by the municipality of a single permit application.

PARTIES

Plaintiffs:

Port Clinton Associates
Port Clinton Marina, Inc.

Defendants:

Board of Selectmen of the Town of Clinton
Virginia D. Zawoy
Margery C. Scully
Patricia A. Swaun
Miguel A. Escalera
Edward A. Miller, III
Town of Clinton
The State of Connecticut
Leslie Carothers, Commissioner of Environmental Protection for the State of Connecticut

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STATEMENT OF THE CASE

In 1972, the respondent Town of Clinton enacted an ordinance entitled "An Ordinance Establishing Building Lines In Certain Clinton Waterways." This provision was enacted under the enabling authority of Section 7-147 of the Connecticut General Statutes. On December 10, 1985, the petitioner Port Clinton Marina, Inc. (hereinafter "Port Clinton") received a conditional permit from the Connecticut Department of Environmental Protection to construct an extension of the docks at its marina, which is located within the waters of Clinton Harbor and/or the Hammonasset River, further into the waterway. The permit was issued by the Connecticut Department of Environmental Protection, subject to any necessary local or federal permit requirements.

Port Clinton also sought approval for its project from the United States Army Corps of Engineers ("Corps of Engineers"), which is responsible for regulating navigable waters of the United States. The Corps of Engineers denied the application in accordance with the provisions of 33 C.F.R. § 20.4(j)(1) on the grounds that local approval from the respondent Board of Selectmen was required before the Corps of Engineers could approve construction because the scope of the requested permit encroached beyond the harbor building lines established under the above-referenced ordinance.

On or about April 14, 1986, Port Clinton applied to the respondent Board of Selectmen of the Town of Clinton for a permit to extend its docks. In accordance with the ordinance, the Board referred the application to the Clinton Harbor Commission, which recommended denial of

the application. A public hearing on the application was held on May 6, 1986, and on June 16, 1986, the Board of Selectmen issued a Memorandum of Decision denying the application.

In its Memorandum of Decision, the Board first noted the purposes and standards set forth in the ordinance, " 'conserving and preserving' the water resources of Clinton Harbor and other waterways." It then refused permission on the basis of "evidence indicating that the proposed expansion would have a negative impact on safety, both in the harbor and on shore and that it could cause harm to the environmental quality of the harbor and its water resources. Both the expansion of the docking facilities further out into the harbor and the resulting increase in intensity of on-shore activities could lead to further crowding, congestion, and pollution."

Port Clinton subsequently filed the instant lawsuit. At no time did Port Clinton submit a permit application for or otherwise seek approval from the Town for a revised or reconfigured proposal for dock construction.

Port Clinton began the present action as an administrative appeal from the Town's action, which appeal was provided for under the provisions of Connecticut General Statutes Section 7-147. After a series of amendments and revisions to the Complaint which added claims for a declaratory judgment that Connecticut General Statutes Section 7-147 is invalid and therefore void, and seeking money damages based upon the alleged taking of the plaintiffs' property rights without just compensation pursuant to the provisions of 42 U.S.C. § 1983, Port Clinton eventually withdrew its appeal under the provisions of

Connecticut General Statutes Section 7-147, apparently choosing to pursue the matter strictly as a "taking" claim seeking money damages as "just compensation."

Section 7-147, as it existed at the time of the enactment of the Town's Harbor Building Lines ordinance and at the time of inception of this lawsuit, was repealed and extensively rewritten by the Connecticut General Assembly in 1988. On May 4, 1988, the Town of Clinton advised both the Army Corps of Engineers and the plaintiffs of its withdrawal of any objection to the granting by the Army Corps of the permit requested by Port Clinton. On November 14, 1989, the Town of Clinton repealed the Harbor Building Lines Ordinance.

After the filing and argument of motions for summary judgment by both parties, the trial court dismissed Port Clinton's Complaint in its entirety on its own motion for lack of subject matter jurisdiction, holding that the counts seeking repeal of the ordinance in question and its enabling statute were moot and that Port Clinton's failure to pursue the available administrative appeal rendered the administrative act in question insufficiently "final" to enable the court to make any determination as to whether Port Clinton's property had been taken or whether just compensation for any such taking had been denied.

The Connecticut Supreme Court disagreed with the trial court that Port Clinton was required to pursue a statutory appeal before bringing its Section 1983 claim, but concluded that Port Clinton did not allege sufficient finality to support either its taking or its Section 1983 claim, holding that the denial of a single permit application, without more, does not fulfill the requirement that a

claimant show that "the initial decision-maker [had] arrived at a definitive position on the issue that inflict[ed] an actual, concrete injury . . . ," as established by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 193, 105 S.Ct. 3108, 87 L.Ed.2d 127 (1985). The dismissal was affirmed.

The petitioner then filed this "Petition for Writ of Certiorari."

REASON FOR DENIAL OF THE PETITION

Contrary to the petitioner's suggestion, this case does not present any important federal question which has not been settled by this Court. The decision of the Connecticut Supreme Court in this matter clearly comports with the well-established precedent of this Court to the effect that a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation in question has reached a final decision regarding the application of the regulation to the property at issue. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985); *Penn Central Transportation Co. v. New York City*, 483 U.S. 104, 136-37, 98 S.Ct. 2665-66, 57 L.Ed.2d 631 (1978); *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 297, 101 S.Ct. 2352, 2371, 69 L.Ed.2d 1 (1981); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-49, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986). This

"finality" prerequisite must be met whether the regulatory taking claim is premised on a "just compensation" theory or a "due process" theory. *Williamson County*, 473 U.S. at 199-200, 105 S.Ct. at 3123.

Port Clinton indisputably submitted only *one* proposal to the respondent Board of Selectmen. The decisions of this Court set forth above clearly establish that such a factual premise cannot possibly meet this Court's "finality" requirement in the sense of showing that "the initial decision-maker [had] arrived at a definitive position on the issue that inflict[ed] an actual concrete injury . . . . " *Williamson County*, 473 U.S. at 193.

The petitioner's attempt to characterize what is clearly and unquestionably a "takings" claim as a claim for impairment of procedural due process of the type recently addressed by this Court in *Zinermon v. Burch*, 494 U.S. ___, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) should be recognized by this Court, as it was by the Connecticut Supreme Court, as adding nothing to the "taking" claim at issue in this matter. In addressing Port Clinton's argument that "the regulation *itself* was invalid and therefore that its 'adoption and application' to Port Clinton caused a temporary taking without regard to the extent of loss caused," the Connecticut Supreme Court correctly declined to recognize such a claim as a basis for discarding the finality requirement set forth by this Court in land use takings claims. *Port Clinton Assoc. v. Board of Selectmen*, 217 Conn. 588, 600-01 (1991) (emphasis in original).

The Connecticut Supreme Court reached its conclusion for two reasons. First, it recognized that Port Clinton

sought not only invalidation of the regulation, but compensation for its injury. "Until a trial court knows 'how far the regulation goes' it cannot determine the extent of the injury, or, indeed, be certain that there is any injury not *de minimis* in scope." *Id.* at 601. Secondly, the Connecticut Supreme Court recognized that:

> [I]n contending that the ordinance itself constituted a "per se" taking, Port Clinton did not charge that the ordinance furthered an improper purpose, but rather attacked its lack of specificity, its jurisdictional basis, and the method by which it was enacted. We do not believe that the constitution requires compensation for any temporary infringement of an owner's property rights, no matter how slight, every time a town makes a mistake in construing an enabling statute or in measuring its geographical boundaries.

Id. at 601-02 (footnotes omitted).

The Connecticut Supreme Court noted at footnote 17 that:

> Port Clinton's complaint attacked the ordinance as "a municipal mode of arbitrarily denying reasonable use of property, confiscating the plaintiffs' property, or arbitrary conduct, abuse of authority, interfering with the rights of citizens who wish to make recreational use of the coastal waters and permitting predetermined suppression of property rights." That allegation is simply another way of asserting that the ordinance was vague and that it confiscated Port Clinton's riparian rights. The record does not indicate that Port Clinton has argued that the ordinance constituted some kind of invidious discrimination or promoted the private aims of its promulgators or in any other way exceeded the police

> power to protect and promote the health, safety and general welfare of the public.

Id. at 601-02 n.17.

As the Connecticut Supreme Court correctly recognized, the talismanic invocation of the words "procedural due process" does not transform an otherwise insufficient "taking" claim into a matter of constitutional importance necessary to compel this Court to exercise its judicial discretion to accept the writ of certiorari.

The respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JOSEPH G. LYNCH
One Goodwin Square
225 Asylum Street
Hartford, CT 06103
(203) 522-6103

Counsel for Respondent